COMPLIANCE BOARD OPINION NO. 00-5

June 28, 2000

Mr. Jim Lee
Carroll County Times

The Open Meetings Compliance Board has considered your complaint concerning the meeting practices of the Carroll County Board of Education (hereafter "County Board"). For the reasons stated below, the Compliance Board finds that, although the County Board's practices generally comply with the Open Meetings Act, the County Board violated the Act by (1) closing a meeting on November 10, 1999, on the basis of the "legal advice" exception in the Open Meetings Act without meeting the requirements of that exception and (2) in certain instances discussing in closed session matters that exceeded the scope of the exceptions on which the County Board relied in closing meetings.

I

Complaint and Response

Your complaint alleged violations of the Open Meetings Act at two meetings in April, 2000, and expressed a concern about an alleged pattern of abuse under which the Act's exception for legal advice is used "as a catch-all when [the County Board] wants to avoid public discussion of an issue." The first of the two more specific allegations concerns a closed meeting said to have been held on April 13, 2000. An agenda for the meeting included four items of particular concern to you: redistricting, modifications to the capacity of Westminster High School, an action plan related to a performance audit, and a request for access to records submitted by a reporter for another newspaper.

The other specific allegation involved a meeting of the County Board on April 26, 2000. During that meeting, according to your complaint, "the board of education went into closed session (following a 3-1 vote) to discuss 'the open meetings law' with the board's attorney. Following the closed session, the board returned to open session, but made no mention of what was discussed in the closed session.... We believe this to be a violation of the state's open meetings law. We also reiterate our concern that the board of education routinely invites counsel to sit in on closed sessions so as to invoke that attorney exemption and then discusses other matters not included under exemptions in state open meetings law."

Finally, your complaint pointed out that, if the minutes of closed meetings are not available for inspection, "it is impossible to determine what was talked about ... [and] impossible to prove that the board is in violation." You asked the Compliance Board to "direct the [County Board] to produce the minutes of past closed sessions – with any sensitive material redacted – so as to determine whether this public body is in compliance with state law."

In a timely response on behalf of the County Board, Edmund J. O'Meally, Esquire, expressed the County Board's "full commitment to both the letter and the spirit of the [Open Meetings Act] ...." Mr. O'Meally indicated that the first of the two specific meetings in question occurred on April 12, not April 13, 2000. In addition to a response focused on that meeting and the meeting of April 26, Mr. O'Meally also responded to the more general allegation about over-reliance on the "legal advice" exception. He did so through a review of minutes from closed meetings extending back approximately six months. Mr. O'Meally's overall conclusion was as follows:

> These minutes demonstrate that the Board of Education and counsel truly make a good faith effort to keep the topics of discussion at closed meetings within the appropriate confines of the law. Nonetheless, it must be conceded at the outset that there have been times when the scope of discussion has strayed into areas for which the meeting could have been closed but was not closed for that particular reason....The Board of Education truly regrets these occurrences and has taken corrective measures ... to help it better fulfill the important public functions articulated in the Act.

Various aspects of Mr. O'Meally's response will be discussed further in the next section of this opinion.

II

Analysis

A. April 12 Meeting

The Open Meetings Act allows a public body to meet in closed session under two circumstances: when the Act itself is not applicable to the discussion, typically because the discussion falls within the "executive function" exclusion from the Act; or, if the Act is applicable, when an exception in §10-508 of the State Government Article authorizes a closed meeting. In the latter circumstance, when the Act is applicable but permits a closed meeting, certain procedural requirements must be

followed, including "a recorded vote on the closing of the session" and the preparation of a written statement setting out "the reason for closing the meeting, including a citation of the authority under the section, and a listing of the topics to be discussed." §10-508(d)(2).

The Board, according to the minutes of the meeting, voted "to close the meeting ... to obtain legal advice and to discuss personnel and collective bargaining." The presiding officer's written statement, however, cited the following four exceptions in §10-508: subsections (a)(2), dealing with personal privacy; (a)(7), dealing with legal advice from the public body's counsel; (a)(8), dealing with discussion of pending or potential litigation; and (a)(9), dealing with collective bargaining negotiations.

Your concern that discussion occurred at the meeting beyond the bounds of these exceptions was based largely on a "meeting agenda" that you obtained from a member of the County Board. According to Mr. O'Meally, however, this agenda was not that of the County Board itself, but rather was that of the Superintendent of Schools, reflecting the items that he would like to see discussed by the Board. In fact, according to Mr. O'Meally's response and the minutes of the closed session, the County Board did not discuss redistricting matters or the Public Information Act request from the reporter. The County Board's discussion in closed session embraced the following topics: appointment of a representative to an ethics panel; the status of collective bargaining negotiations, in light of the resources that might be available in the final budget approved by the County Commissioners; the status of settlement negotiations in ongoing litigation; an unspecified personnel appointment that the Superintendent intended to recommend in open session; an indication by the Superintendent that he intended to seek County Board consensus in open session regarding the use of space at Westminster High School; an indication that a recommendation would be made in open session to engage a consultant for investigating electric deregulation; and the Superintendent's presentation of a timetable for preparing an action plan, intended to address concerns raised in a report prepared by the law firm of Miles & Stockbridge.[1]

Based on its review of the available facts, the Compliance Board concludes that the County Board had a lawful basis for conducting discussions of these matters in closed session. Of the matters identified in your complaint as of special concern, both the Superintendent's presentation about space planning at Westminster High School and his presentation about a proposed action plan for addressing the concerns raised in the Miles & Stockbridge report fall within the "executive function" exclusion from the Act. With exceptions not relevant here, the Open Meetings Act "does not apply to ... a public body when it is carrying out ... an executive function."

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[1] This March 2000 report, titled "Report of Internal Investigation" but quickly made public, discussed the administration of Carroll County school construction projects.

§10-503(a)(1)(i). The term "executive function" is in part defined by what it is not: a discussion of an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is not an executive function. §10-502(d)(2). If a discussion is not encompassed by any of these other defined functions *and* involves "the administration of" existing law, it falls within the executive function. §10-502(d)(1)(ii).

Under existing law, a county board of education has broad authority to exercise control over educational matters within a county. §4-101 of the Education Article. In doing so, a county board is to carry out state law and policy, and "determine, with the advice of the county Superintendent, the educational policies of the county school system." §4-108 of the Education Article. Among its more specific powers, a county board may "rent, repair, improve, and build school buildings ... ." §4-115(b)(2) of the Education Article. When the County Board was discussing (or, apparently, listening to the Superintendent's presentation about) space planning for Westminster High School, it was carrying out a function under existing law. Likewise, when it considered a plan for improved school system operations in light of the Miles & Stockbridge report, it was carrying out or implementing existing legal responsibilities. Therefore, both of these aspects of the closed meeting on April 12 were excluded from the Act's coverage.

Other aspects of the April 12 closed session, not specifically identified in your complaint, likewise fell within the executive function exclusion or were encompassed by exceptions in the Act. However, as acknowledged by Mr. O'Meally, there were procedural irregularities in the closing of the meeting. First, the recorded vote to close the meeting, according to the County Board's minutes, relied on exceptions that differed in part from the exceptions identified in the presiding officer's written statement. That is, the vote to close referred to the "personnel" exception, §10-508(a)(1), which was not mentioned in the written statement; and, conversely, the written statement mentioned the "personal privacy" and "litigation" exceptions, §10-508(a)(2) and (8), which were not referred to in the recorded vote. Moreover, neither the recorded vote nor the written statement included the "procurement" exception, §10-508(a)(14). A public body should ensure consistency between the recorded vote and the written statement, which the County Board did not do. Given the discrepancy, the Compliance Board will look to the recorded vote as the more authoritative evidence of the County Board's basis for closing the meeting.

Two aspects of the ensuing discussion are of concern. In both instances, although the discussion could have been lawfully conducted in closed session if the appropriate exceptions had been properly identified prior to the closing of the session, they were not. In one such instance, the County Board heard legal advice from its counsel about a possible settlement of a lawsuit and then engaged in a discussion regarding the proposed settlement. Although the lawyer's advice was

encompassed by a cited exception, §10-508(a)(7), the County Board did not vote to close the session to "consult with staff, consultants, or other individuals about pending or potential litigation," §10-508(a)(8), which would have justified the closing of the session for discussion beyond the lawyer's advice-giving. Similarly, the County Board discussed a method of procuring electric service, given the forthcoming deregulation of electricity, a discussion of procurement strategy that apparently fell within the exception in §10-508(a)(14), regarding agency deliberations about procurement.[2] Again, however, the County Board did not cite this exception as a basis for its vote to close the meeting (or, indeed, in the written statement). In these respects, the Compliance Board finds the County Board violated the Act in connection with its April 12 meeting.

B. April 26 Meeting

On April 26, citing the Act's exception for obtaining legal advice, the County Board closed its session and summarized the topic to be discussed as follows: "to obtain legal advice on the Open Meetings Act, the Public Information Act, and personnel matters related to the school system." While some may find it ironic that a meeting about the Open Meetings Act should be closed, there was no illegality in the County Board's doing so *if* the discussion was limited to the obtaining of legal advice from the County Board's counsel. In this respect, the Open Meetings Act is no different than any other law, and a public body is entitled to meet in closed session to hear advice from its lawyer on how to comply with any of the laws that affect it. According to Mr. O'Meally's response, this aspect of the closed meeting was limited to legal advice rendered to the County Board by a partner in the law firm that represents it. Under the circumstances, and absent evidence that the discussion in closed session transcended the rendering of this advice, the Compliance Board finds no violation in the closing of the session.

III

Overall Meeting Practices

Your complaint in essence contended that the County Board uses the "legal advice" exception as a cloak for closing discussions that otherwise would have to be held in public. Indeed, as the Compliance Board has held on many occasions, the exception is a relatively narrow one, limited to the give-and-take between lawyer and client in the context of the bona fide rendering of advice. Discussion of policy

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[2] This exception permits a public body, "before a contract is awarded or bids are opened, [to] discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process."

issues or other matters beyond the exception would violate the Act. As we observed several years ago, "once the [legal] advice has been sought and provided, the [public] body must return to open session to discuss the policy implications of the advice that it received...." Compliance Board Opinion 95-11, *reprinted in* 1 *Official Opinions of the Open Meetings Compliance Board* 145, 149 (1995).

With exceptions to be discussed further below, Mr. O'Meally denied that the County Board had transgressed the limits of the "legal advice" exception. According to the information provided by Mr. O'Meally, of the 18 occasions from October 13, 1999, through April 12, 2000, on which the County Board met in closed session, it cited the legal advice exception 13 times. Although this is a high percentage and, under other circumstances, might be suggestive of over-reliance on the exception, the Compliance Board notes that during this period the County Board was faced with both a complicated settlement proposal in litigation and the Miles & Stockbridge report, which raised serious legal issues. Under these circumstances, it is unsurprising that the County Board sought legal advice from its counsel on a number of occasions.

On two occasions the County Board closed a session on the basis of the legal advice exception but then conducted a discussion that exceeded the bounds of this exception. On these occasions (October 13, 1999, and December 6, 1999), Mr. O'Meally contended, bona fide legal advice was rendered but the ensuing discussion was broader. In both of these instances, Mr. O'Meally pointed out, the ensuing discussion concerned pending litigation and therefore the meeting could have been closed under §10-508(a)(7), the "litigation" exception. Accepting that contention, the Compliance Board nevertheless finds that a violation occurred when the County Board failed to cite that exception prior to closing the meeting. The law requires a correspondence between the exceptions cited and the scope of the ensuing discussion.[3] This is not an exercise in meaningless paperwork but rather an important tool of accountability under the Act.

At another meeting, on January 12, 2000, the discussion following the rendering of legal advice included, as Mr. O'Meally conceded, "matters that went beyond the reason for closing the meeting in the first place." These additional topics of discussion, specific personnel matters and collective bargaining issues, could have been held in closed session had the appropriate exceptions been cited.

The Compliance Board notes one additional issue arising from the meeting on November 10, 1999. According to Mr. O'Meally, "legal advice was rendered, and counsel was present; however, the advice of counsel was presented to the Board of Education members by staff, rather than counsel." As we understand the

[3] To be sure, if a discussion exceeds the bounds of a cited exception but falls within the executive function exclusion, the conduct of the discussion does not violate the Act.

situation, although one lawyer who represents the County Board was present, that lawyer was not the source of the advice. The advice came from a different lawyer, who had been retained by the County Board's insurance carrier to represent the County Board in three pieces of litigation. The advice of this absent lawyer was communicated to the County Board by an Assistant Superintendent.

The legal advice exception permits a closed session when a public body needs to "consult with counsel to obtain legal advice." If counsel is not present, in person or by telephone, the required element of "consultation" is missing. Given the Act's strict rule of construction in favor of open meetings, §10-508(c), we have held that "the exception ... may *never* be invoked unless the lawyer is present at the meeting." Compliance Board Opinion No. 93-6, *reprinted in* 1 *Official Opinions of the Open Meetings Compliance Board* 35, 37 (1993). The Compliance Board finds that the County Board violated the Act in this regard.

IV

Access to Minutes

In your complaint, you requested that the Compliance Board "direct" the County Board "to produce the minutes of past closed sessions - with any sensitive material redacted - so as to determine whether this public body is in compliance with State law." This request is ambiguous; it is not clear whether you sought an order from the Compliance Board that the redacted minutes be made public or merely that they be made available to the Compliance Board.

If the former was intended, the Compliance Board has no authority to do so. First, the Compliance Board lacks the statutory authority to direct an action by the County Board or other public body. §10-502.5(i). The Compliance Board's function is solely to issue advisory opinions. Moreover, the Act itself states that, with certain exceptions not relevant here, "the minutes ... of a closed session shall be sealed and may not be opened to public inspection." §10-509(c)(3)(iii).

If the latter was intended, again, the Compliance Board has no authority to direct a public body to produce closed session minutes to the Compliance Board. We note, however, that Mr. O'Meally voluntarily supplied closed session minutes as part of his response to the complaint.

V

Conclusion

In summary, the Open Meetings Compliance Board finds that the Board of Education of Carroll County had a proper basis for closing the two meetings cited in your complaint and, apart from the meeting on November 10, 1999, properly invoked the "legal advice" exception at other meetings within the past six months. The County Board violated the Act, however, in the closed sessions at which it discussed matters that went beyond the "legal advice" exception without having first voted to close the meeting on the basis of other exceptions that could have applied to these additional discussions.

OPEN MEETINGS COMPLIANCE BOARD*

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*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.